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SUPREME COURT

No. 411

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

MYRTLE TWEEDY, as Administratrix of the Goods, Chattels and Credits which were of HAROLD F. TWEEDY, Deceased,

Petitioner,

—against—

THE ESSO STANDARD OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 19, 1961 (67a*) affirming a final judgment for the respondent entered by the United States District Court for the Southern District of New York after trial without a jury (Rec. 360).

Opinions Below

The Court of Appeals affirmed the final judgment for the defendant in a short unreported opinion as follows: "Per Curiam, affirmed upon the opinion of District Judge McGohey, D.C.S.D.N.Y., 190 F. Supp.

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* Numbers followed by "a" refer to the printed portions of the record in the Court of Appeals; Rec. refers to the unprinted portions of the record.

437, finding that the decedent's death did not result from any negligence of, or breach of duty owed him by, the defendant. Thus, we do not reach the further issue discussed by Judge McGohey relating to lack of proof of damages" (66a). The opinion of the District Court is reported in 190 F. Supp. 437.

Jurisdiction

The Judgment of the Court of Appeals was entered on June 19, 1961 (67a). The jurisdiction of this Court is invoked under Section 1254 of Title 28, U.S.C.A.

Statute Involved

The statute involved is the Jones Act. (46 U.S.C.A. sec. 688.)

Questions Presented

Petitioner's intestate was employed as a cook aboard the defendant's coastal Tanker Esso Potomac. He was lost overboard in Chesapeake Bay while performing his duties, alone, of dumping a 12 gallon half full garbage bucket over the side and thereafter attempting to wash the bucket in the sea, while the ship was under way. The bucket was not equipped with a lanyard or rope; the ship was not equipped with an automatic garbage grinder or disposal unit; the practice of washing the bucket in the sea was habitual and no warning or instruction against this dangerous practice was ever given; the decedent's absence was

not reported for about 10 minutes after he was last seen during which time the vessel had traversed a distance of about one mile and a half; the master did not lower the lifeboats at any time; no life rings were ever used and the ship was turned off her original course by 1000 feet in a circling search effort. The questions are:

1. On the findings of facts, the uncontradicted evidence and inferences therefrom, did not the District Court and Court of Appeals, in concluding that there was no employer negligence, fail to apply the correct liability standards under the Jones Act as formulated by this Court (*Schulz* v. *Penn. R. Co.*, 350 U.S. 523, 526; *Rogers* v. *Missouri R.R. Co.*, 352 U.S. 500, 506; *Palermo* v. *Luckenbach*, 355 U.S. 20)?

2. Was there not some employer negligence, "even the slightest", (*Rogers* v. *Missouri R.R. Co.*, *supra* at p. 506) when the employer failed to warn, instruct, or even order its cooks and the decedent against the dangerous habitual practice of bending over the ship's rail, while she was under way, to dip and wash the garbage buckets in the sea?

3. Was there not some employer negligence, "even the slightest" when the employer did not install in this ship an automatic garbage grinder or disposal unit; and did not the absence of such a machine create or aggravate, in some measure, the risks inherent in the garbage disposal and can washing procedure?

4. Was there not some employer negligence, "even the slightest" when the master failed to use time-honored good seamanship methods, under all the circumstances, to effectuate a rescue?

5. Did not the District Court err when it substituted its judgment as to what good seamanship requires a master to know and do, in the specific circumstances here, in a man overboard emergency, for that which master mariners have long observed?

Statement

The action was brought under the Jones Act by the widow of Harold F. Tweedy in her own behalf and in behalf of their son, a permanently disabled victim of cerebral palsy. The case was tried without a jury; the Trial Court, granting judgment for the defendant, concluded that Tweedy's death did not result from any negligence of, or breach of duty by, defendant. On what amounted to a demurrer to the evidence, the Court of Appeals reached the same conclusion.

The trial court made the following pertinent fact findings: (190 Fed. Supp. 438, 439).

Tweedy was 58 years old. He was the cook on defendant's twin screw diesel tanker Esso Potomac. The vessel, fully loaded, was proceeding south in Chesapeake Bay from Baltimore, Maryland, to Alexandria, Virginia. The vessel's freeboard was from 13 to 16 inches and she was making eight knots heading into a 15 mile wind with 2 feet high waves.[1]

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(1) The court concluded that the vessel "was not taking water over her decks" and that the after deck was "free of oil and grease" although Dopkowski, the only eyewitness, whose deposition was read at the trial had testified there and at the Coast Guard hearing held within 48 hours of the tragedy (63a-64a):

> "Well, I saw him go out the door to dump his bucket. After he dumped the bucket he cut in by the stanchions (indicating port quarter) and he walked this way (indicating), up the

The ship's galley was at the stern; the door facing the after deck. Just after supper, at 6:30 P.M., April 16, 1957, Dopkowski and other crew members were in the galley when Tweedy was seen by Dopkowski carrying a 12 gallon garbage bucket about half-full[2] with a removable cover, toward the rail on the port side near the stern. The rail was about 2 ft. 6 in.

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port side and when he walked this way I said to the fellow along side me 'Do you see him' and he said, 'No'. So I jumped up and rushed out. I figured he reached out to rinse the bucket, like I do once in a while too, and when I went out I didn't see him, so I rushed around the back and looked in his room and my room, and I looked in the shower room to see whether he was washing the bucket out, but I didn't see the bucket and went to the Chief's room and said 'He must have gone overboard,' because the bucket or him couldn't be found, and that was 6:12 p.m. See, generally, when it washes out there grease rolls up into balls and I figured he might have slipped and hurt himself, so when I didn't see him I figured this way: I figured, well, he might have fallen down and hurt himself, so when I rushed out and didn't see either one I figured he might have gone around this way to the shower room to wash the bucket out, but I didn't see him, so I rushed right to the Chief's room and said 'The man's gone, bucket and all.' He had a habit of dipping the bucket down and rinsing it out when he emptied the garbage. I seen him dump the garbage, but I didn't see him when he dipped the bucket."

Dopkowski had testified that there was six inches of water flooding the fantail (47a). This must have been so considering the physical facts that the vessel's freeboard was only 13 to 16 inches. The waves were 2 feet high and the ship was making 8 knots into a 15 mile wind. Why the Trial Court saw fit to disregard this testimony by deposition and the physical facts it found and accept the version of the master, who was responsible for the safety of his crew, that the deck was dry and free of oil and grease, we do not know.

(2) Dopkowski testified without contradiction, but the trial court made no finding thereon, that the bucket had no line or rope attached to it.

"Q. Well, when the people that washed the bucket by putting it over the side, did they hold onto the bucket or did they have a line or a rope? A. Hold onto the bucket.

Q. There was no line? A. No line." (62a-63a

high and the top was 5 in. wide. Tweedy was about 5 ft. 2 in. tall and weighed between 200 and 225 pounds. Tweedy emptied the bucket over the side and was last seen moving forward along the port rail by Dopkowski. When after a few minutes Tweedy did not return, Dopkowski commenced a search of the ship and then notified the master (190 Fed. Supp. p. 439; footnote p. 5 supra). It was then 6:42 P.M., about 12 minutes after Tweedy had left the galley to dump the garbage and about 10 minutes after Dopkowski had last seen him. The ship was then at least a mile and a half south of her position when Tweedy was last seen. The master was on the bridge. He ordered a hard left turn "in order to swing the propeller" away from the port side where Tweedy was last seen and *put the ship about to set a course to "backtrack"*[3] "over the area the vessel had traveled since 6:30" P.M. The master also ordered a search of the vessel, turned on the floodlights and searchlights, called the Coast Guard, stationed lookouts on top of the fore and aft houses and life rings were readied to be thrown over if Tweedy was sighted. Tweedy was sighted by Dopkowski and Krause "floating face down with arms outstretched", though they differed on distances and no one else "was able to see" what they said they saw (190 Fed. Supp. 439). The master, accepting Krause's and Dopkowski's word for what they saw, turned the vessel sharply (again going off course and away from the object sighted, this time by 130 feet

(3) Here the trial court distorted the master's own testimony and left the Appellate Court with the wrong impression on a crucial issue of negligence stemming from incompetent seamanship, as we later point out (infra, pp. 19-20). The master testified that he executed a "U" turn to his left, admitting that he deviated from his course by about 1000 feet (54a).

(59a) (footnote infra, p. 8). The vessel continued to "sweep the area" but at no time during the search was a single lifeboat lowered though the ship had two, and no life rings were ever thrown even when Tweedy was allegedly sighted; the trial court finding that Krause and Dopkowski did not see what they informed the master they did see. Everyone aboard was wearing a life jacket and the trial court stated that the men were "detailed", if Tweedy was sighted, to go with the master into the water to rescue Tweedy.(4)

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(4) The word "detailed" is misleading and does not, again, comport with the evidence. To "detail", in military parlance, means to tell off or appoint for some special service (Webster's Collegiate dictionary 5th Ed.); really, to order a special job done. The master did not detail anyone to jump into the water. He testified: (59a)

Q. Did you throw any life jacket into the sea? A. No.

Q. Did you order any thrown into the sea? A. No.

Q. Did you throw any life buoy or life ring into the sea? A. No.

Q. Did you order any thrown in? (98) A. No.

Q. Did you order any man to jump in if he saw Tweedy in the water? A. I didn't order anyone. I said I would do it, and the other men did this likewise.

Q. But you gave no instructions to anybody to jump in if they saw the man, did you? A. No.

Q. The man was seen within 50 feet of that vessel at one of the runs, wasn't he? A. No.

Q. Was it reported to you that he was seen? A. Someone said they saw him, but they didn't say where.

Q. Did anyone report to you that he was seen within 50 feet of the vessel? A. They didn't report the distance.

Q. But they reported to you they saw the man? A. I gathered the information that they did——

Q. At the time when you got the word that they saw the man in the water, did you stop the vessel? A. I swung right around and went to that spot.

Q. Did you stop it? A. It was running at slow speed.

(99)

The Court: The question is: You didn't stop it?

The Witness: No, sir.

Q. How much of a swing did you make, a complete U-

Concededly the vessel was not equipped with an automatic garbage disposal unit. The uncontradicted testimony of the defendant's own expert, Pavlik (60a, 61a) was that it would cost to install, in the Esso Potomac, (including the cost of the unit) a garbage disposal grinder, $2,000—$2,500, and the ship was worth about a million dollars. Notwithstanding this evidence, the trial court concluded that "only with some difficulty and substantial expense could such a unit be installed in the ship". He found, correctly, that "no tankers of *her size* are, or ever have been" equipped with garbage grinders although the uncontradicted evidence reveals that this ship had a complement of 11 men requiring three meals a day and snacks (53a).

The trial court, refusing to face the issue as to whether the ship should not have been equipped with an automatic garbage grinder (190 Fed. Supp. 439, 440), concluded that, in any event "the absence of such a unit had no causal relation to Tweedy's death; that it was *his own gross negligence* which produced that result if he fell or was pulled into the water while attempting to wash the bucket by dipping it into the bay. The trial court went on to say that *Tweedy was not required to expose himself to the danger inherent in attempting to wash the bucket in*

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swing? A. No, I backed one engine coming on the other, and she turned half the length.

Q. That would be how many feet of the diameter of the arc? A. Roughly 130 feet.

Q. So that turn would take you 130 feet away from where the man said they sighted the man in the water? A. Probably would, yes, sir.

the sea by any rule or order(5) and that he could have washed the bucket in the washroom. The trial court could have found, because the evidence is undisputed, that this dangerous practice of washing buckets in the sea, was habitual, indulged in by other cooks as well as Tweedy and even Dopkowski (61a, 62a); that no instructions against the practice were given except by Dopkowski, a pumpman, to one cook after the Tweedy tragedy (62a) and the master assumed the practice was going on but did not concern himself therewith (29a, 30a).

Reasons for Granting the Writ

1. The true administration of justice is supposed to be the firmest pillar of good government. But when some trial, and even intermediate appellate, courts rationalize an obviously preconceived notion of what the law ought to be in a given case, in disregard of the plain mandates repeatedly given by this court of what the law is, the firmest pillar begins to shake and justice is in grave danger of being buried under an avalanche of chaotic individual ideas of sound legal principles applicable to specific cases. This case is a classic example of a miscarriage of justice by a trial court who took nearly eight months to rationalize his conclusion that there was absolutely no negligence or breach of duty on the part of the employer (because Tweedy was foolish enough to attempt to wash his bucket in the sea) in plain disregard of the standard of liability laid down by this court in cases arising under the Jones Act.

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(5) This illustrates the speciousness which permeates the trial court's opinion and demonstrates the mental attitude of some trial judges, at war with settled principles. If Tweedy was a fool, it does not follow that the employer was not also, in some measure at fault (infra, p. 10).

This court formulated and repeatedly affirmed that the correct liability standard in these cases is that "petitioner is entitled to recover if her husband's death resulted 'in whole or *in part*' from defendant's negligence". (*Schulz* v. *Penn. R. Co.*, 350 U.S. 523, 526). And fair minded triers of fact must search the record evidence and draw the fair inferences of fact therefrom; and if employer negligence did play a part "even the slightest", liability must be concluded; contributory negligence, absorbing the doctrine of assumption of risk, merely mitigating the damages (*Rogers* v. *Missouri R.R. Co.*, 352 U.S. 500, 506; *Palermo* v. *Luckenbach*, 355 U.S. 20; *Socony* v. *Smith*, 305 U.S. 424, 428).

The trial court disregarded these well settled rules to sustain the fixed notion that it was Tweedy's sole fault for dying by drowning. Having no jury to charge, he should have charged himself with these rules in the light of the record evidence in this case (see *Romero* v. *Garcia*, 286 F. 2nd 347, 355, 356); evidence developed almost entirely out of the mouths of the defendant's own witnesses and virtually free of conflict on really material issues. The issue of employer negligence, even the slightest, was, therefore, one of law on this record. We submit that this trial court literally went out of its way, as we pointed out in the statement of facts and footnotes thereto (supra pp. 4-9) to distort the record evidence, disregard physical facts, characterize evidence improperly, substitute his judgment of what good seamanship requires in a man overboard emergency bolstered by opinion testimony of a master seeking to exculpate himself from blame for the death of one of his men, without even attempting to consult the leading manual which

guides master mariners in such emergencies, Knight's Seamanship 10th Ed., Chap. XVII, pp. 590-593. Had he consulted Knight's book he would have realized that the master was completely ignorant of what he was required to know and do under the circumstances he was confronted with. The Court of Appeals, apparently, paid no attention to this feature of the case too, though the subject of rescue duty and methods was briefed rather thoroughly. The trial court did not seek briefs.

2. The employer was guilty of some negligence in this case:

A. The Failure to Warn, Instruct or Issue an Order Against Washing Garbage Buckets in the Sea and Not Providing the Bucket Handle With a Rope or Lanyard.

The evidence, and the findings, justify the inference that Tweedy met his death while attempting to wash a garbage bucket by leaning over the rail and dipping the bucket in the sea while the ship was under way at 8 knots into a 15 mile wind. This was the only inference that could be drawn by any reasonable minded person on the observations of the witness Dopkowski who drew this inference himself at the Coast Guard hearing held within 48 hours of the tragedy (63a). In the first place, as the trial court has found (190 Fed. Supp. 440), this method was inherently dangerous. This being so, why then did the Court not conclude that Tweedy's accident resulted from this hazard of his employment? The answer given by the Court in his opinion (190 Fed. Supp. 440) is that Tweedy need not have incurred this risk because he could have

safely washed out the garbage bucket in the washroom. The evidence is undisputed that this careless method of cleaning the bucket had been indulged in not only by Tweedy, but by other cooks and Dopkowski as well (61a, 62a). No instructions against this dangerous practice were given except by Dopkowski[6] to one cook after the Tweedy tragedy (62a). The master assumed the practice was going on but did not concern himself therewith (29a, 30a). The patent unsuitability of washing greasy, slimy garbage containers in a washroom may explain in some measure why the cooks frequently resorted to the dangerous alternative of washing their buckets in the sea. Nor does it matter that a safer alternative was available because, as this Court has emphasized, such alternative does not eliminate the presence of the alluring dangerous alternative. Human nature being what it is, and the

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(6) Here no warning was ever given Tweedy or the other cooks before the tragedy not to wash the bucket in the sea. But even if such a warning had been given, it would not have met the standard of care required because the degree of danger was so great that nothing short of a master's order forbidding the practice would have sufficed. Compare the following statement from Judge Clark's opinion in *Parsons* (246 F. 2d 557, at pages 562-563):

> "The charge is further quite objectionable in its assumption that the defendant could in no event owe any higher duty to the plaintiff than to warn him of the danger in the port passageway. The majority cite the concurring opinion in Lynch v. United, 2 Cir., 163 F. 2d 97, 99, for the proposition that it may be negligent not to warn of the dangerous passage; but neither that case nor any other case cited to us holds that the duty of reasonable care is always satisfied by a mere warning. Often, where the continued presence of the peril serves no important useful purpose to the defendant and the cost of removing the peril is small, a reasonable man will remove the danger, and not just warn of it. This is a perfect example of such a situation: How simple it would have been to replace the burned-out light bulbs, wipe up the grease, and prevent this accident!"

statute condemning employer negligence in whole or in part, however slight in degree, requires the trial court to recognize the hazard as playing a part in causing the tragedy. See *Palermo* v. *Luckenbach*, 355 U.S. 20.

The findings of the trial court underscore the negligence of the employer in not having *forbidden* its employees to resort to this dangerous expedient, or in not furnishing an appliance which would lessen the risk. Indeed, if any case presents a classic example of foreseeability of the extreme danger to which Tweedy, and his co-workers were exposed, it is this case. As the court below has found: The vessel was so fully laden that she had only about 13 to 16 inches of freeboard at her stern; she was moving at 8 knots against a 15 mile wind; the waves were 2 feet high; Tweedy had to hoist and dump a 12 gallon, half-full bucket, with a handle, to which no rope or lanyard was attached (62a, 63a). He, therefore, had to bend over the 2 foot 6 inch rail in order to dip the bucket in the sea. Even a tall, young fellow would experience a tug in such a situation that could easily yank him overboard. Tweedy was 58 years old, short and fat. The evidence being uncontradicted that this dangerous practice went on for a period of time before and after Tweedy's death (61a, 62a), how can one fail to conclude that the master was not remiss in tolerating its continued indulgence. *A fortiori:* would this follow when, as here, the wind, sea, speed and deep draft of the ship aggravated the hazard.

B. The Absence of an Automatic Garbage Grinder.

The absence of an automatic garbage disposal unit rendered the vessel unseaworthy and constituted employer failure to provide a safe place to work. The

court below found that "it is possible, though only with some difficulty and substantial expense, to install such a unit on the Esso POTOMAC." The evidence given by the appellee's witness, Frank L. Pavlik, was that it would cost between $2,000.00-$2,500.00, including the cost of the unit, to install one in this ship and that the ship was worth at least a million dollars (60a-61a). Realizing that, in this day and age of automation, the fact that no tankers of the size of the Esso POTOMAC were equipped with automatic garbage grinders is "not necessarily conclusive" to a determination of a standard of care holding the employer at fault for failure to provide such a unit, the court below, refusing to apply such a standard, went on to conclude that "in any event" the absence of the unit had no *causal relation* to the decedent's death because the decedent had disposed of the garbage without injury and (speculating correctly on the evidence, as did Dopkowski before the Coast Guard, supra p. 5) either "fell or was pulled into the water while attempting to wash the bucket". The court then concluded "that it was his own gross negligence which produced that result" (190 Fed. Supp. 440).

How simple it would have been to have issued a company rule not to wash buckets in the sea; or else invest $2,500.00 in a garbage grinder in this one million dollar Tanker!

If the test, in these cases, is whether employer negligence played any part, even the slightest, in the decedent's falling or being pulled overboard, then how can it be urged that the absence of an automatic garbage grinder could not have some "causal relation", (to use the trial court's language); could not

have contributed in even a slight degree, to the decedent's going overboard. (See the language of Judge Hand in *Zinnel* v. *U. S. Shipping Board*, 10 F. 2nd 47, 49). Such a unit would have rendered a 12 gallon garbage can unnecessary to begin with; there would have been no necessity for either dumping the load of such a can over the side or of subsequently washing out the residue either in the sea or in the washroom where garbage residue would, likely, adversely affect the washroom facility from a standpoint of odor, health, or mechanical efficiency.

If the trial court's conclusion of no "causal relation" was meant to convey the idea of lack of proximate cause, he was grossly in error under the foregoing authorities. Whether "employer negligence played some part" in the decedent's going overboard because of the absence of an automatic garbage disposal unit, or because Tweedy was permitted to indulge in an inherently dangerous practice of washing the can over the side, is a question of common sense in these cases, not of technical "legal causation". The Court's conclusion that it was the decedent's own gross negligence that caused him to go overboard because he could have washed the bucket in the washroom flies in the face of the common-sense standard applied by this Court in the cases cited supra p. 10 and of the holding in *Palermo* v. *Luckenbach*, 355 U.S. 20, 2 L. Ed. 2d 3; and see *Socony* v. *Smith*, 305 U.S. 424 at p. 428 and pp. 431, 432.

The concurring opinion of Judge Frank in the *Poignant* case (255 F. 2d 595, pp. 600-601) is persuasive of what the rule is, in reasonably equipping a

vessel. It is not what is generally provided aboard comparable ships, but what ought to be done as a standard of reasonable prudence. That these automatic garbage grinders were being installed and came into general use around the year 1945, (true, in larger vessels than the Esso POTOMAC), is not disputed (36a). But, as Judge Frank noted, what is not generally done on a smaller vessel is not the test of reasonable fitness under the *T. J. Hooper* doctrine (60 F. 2d 737, 739) when the safety of the crew is involved.

As a matter of common sense, preparing 33 meals and snacks a day on this 11 man ship (53a, 25a) by a single man is quite a job and generates a lot of garbage. Furthermore, neither Dopkowski nor any of his other fellow crew members offered or were even ordered to assist Tweedy in disposing of garbage; and precious minutes passed while these men gossiped in the galley; and precious more minutes passed before Dopkowski aroused himself to Tweedy's non-return, searching the ship before notifying the master. It was suggested by appellee (Brief, Court of Appeals, p. 5) that automatic garbage grinders do not dispose of large bones, tin cans and crates. True, but large bones, tin cans and crates can be tossed overboard, together with a disposable container (39a) thereby eliminating buckets that need washing.

C. The Master Was Under a Duty to Rescue Tweedy; He Was Grossly Incompetent in His Rescue Efforts; He Did Precisely the Opposite of What Good Seamanship Required of Him.

Mr. Justice Cardozo, in a dictum in *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, p. 377, said:

> "There is little doubt that rescue is a duty when a sailor falls into the sea. United States v. Knowles (D.C.) 4 Sawy. 517, Fed. Cas. No. 15,540, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. Harris v. Pennsylvania R. Co. (C.C.A. 4th) 50 F. (2d) 866, supra."

Beyond this statement of duty, our research discloses no case in which this court has expressed its views on the subject of negligence in rescue cases other than to deny certiorari, as it did, in *Macomber's Case* 1942 A.M.C. 41, reversed by the Supreme Court of Louisiana 1942 A.M.C. 816, Cert. den. 87 Law Ed. 532.

Lower courts, trial and appellate, Federal and State, have variously stated what is required in carrying out the duty to rescue. Thus, the New York Appellate Division, Second Department, in *Marczinak* v. *J. B. King Transp. Co.* (170 A.D. 56; 155 N.Y.S. 608, 609) said:

> "It was the duty of defendant's captain, when informed that plaintiff was overboard, to use reasonable care, not only to prevent further injury, but to rescue the unfortunate man, if it could be done by the exercise of the care and prudence of a reasonably careful pilot placed in his position at the time."

The New York Court of Appeals in *Raolaslovic* v. *New York Cent. R. Co.*, (245 N.Y. 95; 156 N.E. 625) went one step further and held that:

> "It was not enough that he (the master) should 'act prudently, in view of the knowledge which he actually had. He is responsible for his ignorance of that which he ought to have known'. Shearman & Redfield (5th Ed.) sec. 87."

And in *Trans-Pacific Fishing Co.*, 152 F. Supp. 44, the District Court, Western District of Washington said:

> "It is the duty of every shipowner and ship operator to use *every possible available means to rescue* from the sea any and all persons and members of its crew who may be unfortunately washed overboard. In this instance the skipper and all those aboard at the time and the owner failed and neglected to do that." * * *

In *Macomber's Case* (supra p. 17), the Supreme Court of Louisiana, when reviewing virtually all the man overboard cases, distinguished *Johnson* v. *U. S.* 74 F. 2d 703), as did the court in *Tompkins* v. *Pilots Ass'n.* (32 F. Supp. 439, 441), because there the master was indeed confronted with a choice between two *different incompatible* methods of rescue, and said (*Macomber's Case*, at p. 822, 1942 A.M.C.):

> "Moreover, the law does not leave any discretion to the officers and crew of a boat in cases of such emergency."

We respectfully submit that the master did not use every possible available means to effect rescue, and

the shipowner breached its contractual duty to Tweedy in that regard.

Admittedly, the master could, on learning that Tweedy was overboard, have lowered the lifeboats in a matter of seconds (58a). Yet he did not take this elementary, time-honored precaution. Furthermore, he could have pursued the measures he adopted *in addition* to lowering the lifeboats. He was not "confronted with a choice between two different *incompatible* methods of rescue". (*Tompkins* v. *Pilots Ass'n.*, 32 F. Supp. 439, 441). He was manifestly himself aware of this unfortunate omission because when he was first asked why he did not lower the lifeboats, he said, "the sea was too rough" (56a). At the trial he abandoned this explanation and, contradicting his earlier testimony, denied that the sea was too rough for lowering the lifeboats (58a). This time he said that the methods he used to effect rescue were superior to lowering the boats (26a-27a). But his belated explanation indicates the self-exculpatory character of his testimony, because it was not a mutually exclusive choice between two courses of action; he could, and should, have done both. Who is to say that Tweedy might not have been saved had he lowered the lifeboats? Saving a man overboard is not a guessing game as to what measures are best. All must be adopted.

It is important to note that the master could have lowered the lifeboats in the very track that the vessel had traversed, whereas in executing a "U" turn to his left, he admitted that he deviated from his track by about 1,000 feet (54a); and see the turning circle of a 250′ ship; 318 yards (Knight's Seamanship, p. 295). This fact underscores the distortion by the trial

court in saying that he "backtracked." The fact is that the vessel made a series of "sweeps" in the general area of her former course, but this is a far cry from saying that she retraced her course. She could easily have been hundreds of yards off that course, whereas the lifeboats would have been able to far more easily "backtrack" a mile and a half on the former course.

The trial court said: "Plaintiff offered no testimony as to what good practice required under the existing conditions" (190 F. Supp. 440). He then stated that the master's procedures were better than lowering lifeboats[7] and substituted his judgment of good seamanship for that recognized by all master mariners and, indeed the Courts. See *U. S. v. Knowles*, supra, p. 17, cited by Mr. Justice Cardozo, where Judge Field said, among other things, that the master "is bound, both by law and by contract, to do everything * * * necessary to rescue the person overboard and, for that purpose *to stop the vessel, lower the boats* * * *" (26 Fed. Cas. 801, 802).

This duty to rescue and to do everything necessary to effectuate a rescue is so mandatory that contributory negligence is no defense to its breach (*Harris v. Penn R. Co.*, 50 F2nd 866, 868, cited by Mr. Justice Cardozo in *Cortes*, supra, p. 17 and it matters not whose fault it was that the sailor went overboard to begin with (*Kirincich v. Standard Dredging Co.*, 112 F2nd 163, 164).

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(7) The master testified his ship was very maneuverable and the trial court accepted this as an excuse for not stopping and lowering the lifeboats. But the fact remains that the ship was so deeply laden that she had only 13-16 inches of freeboard.

The lifeboats were not lowered at any time; the life rings were never used, even when Dopkowski and Harris informed the master that they spotted Tweedy; and it may be inferred from the absence of testimony thereon by the master that no "marker" of any kind was thrown astern in the ship's track (if this ship was equipped with a suitable marker). This court may observe that there are difficulties attendant on producing expert shipmasters to testify as to what "good practice" requires in a man overboard situation, just as there are difficulties in persuading doctors to testify in a malpractice case. But Knight's Seamanship (Chapter XVII, p. 590-593 10th Ed.) may be referred to as a guide to what a master should know and do as a matter of good practice. To turn the ship's screws away from the side of the ship when a man goes overboard is good practice only when knowledge that the man is overboard occurs virtually at once with the fact. (See *Macomber's Case*, supra, p. 17, at p. 825.) Since Tweedy was then overboard about a mile and half astern of his ship, the master blundered by turning the ship to port and thus getting off his original course by 1000 feet. When a man overboard is clear of the screws, Knight instructs (Knight's Seamanship, p. 591-593) what is good practice under circumstances such as here existed, especially since the ship's *heading* was both into a 15 mile wind and the tide: (190 F. Supp. 438, 29a).

> "Under ordinary circumstances the engines are thrown *to full speed astern as soon as the man is clear of the screw, and a boat is lowered as soon as the speed has been reduced sufficiently. The boat pulls back in search of the man*, guided by signals from the lookouts aloft, provided they

have succeeded in keeping the man or the buoy in sight. Failing this, *the boat cannot go far wrong if it pulls back on a course opposite the original heading of the ship;* for, although the steamer in backing will probably throw her head to one side, she will not usually gain a great amount of ground in that direction before coming to rest. In most conditions of the sea, a boat may be lowered with reasonable safety at a speed of five knots; and we may assume that the distance required to reduce the speed to this will be from two to four ship's lengths, and the time, from two to four minutes.

* * * *

Without attempting to lay down rules for the endless variety of situations which may arise in a matter of this kind, it will perhaps not be going too far to say that, *generally speaking, the ship should be stopped and backed if she has the wind and sea ahead.*" (Italics ours.)

Under the physical facts and circumstance here the master should have stopped the ship, lowered the life boats with instructions to pull back on a course opposite the original heading and then backed his own ship in the same course since he had the wind and sea ahead.

Further, by this time night was falling, and a man in a lifeboat would have had a far better opportunity of scanning his immediate area at water surface level than a lookout perched on the fore and aft houses of the tanker, with the searchlights and floodlights playing on the water in the ship's original course, and if

Tweedy was sighted could far more quickly have rendered effective aid. Again, as Knight (p. 592-593) says:

> "If the conditions are such—due to the lack of a proper marker, or to fog, or to any other cause—that difficulty is to be anticipated in finding the man, *it is probably better to stop and send the boat back along the course opposite the original heading.* This emphasizes the importance of having a compass in the boat." (Italics ours.)

Indeed, who can say whether Dopkowski and Krause were not correct in their testimony that they saw Tweedy in the water? If they were in a lifeboat, they could have come to his aid. But on reporting their discovery, the master again turned the ship around, this time 130 feet away (supra footnote p. 8) from the place of discovery and again failed to lower a single lifeboat. Can it fairly be said that the master did everything possible; that he used every available means to effectuate a rescue? Indeed, can it not be said, rather, that the master was wholly incompetent in this emergency.

3. We do not reach the issue of damages as did not the Court of Appeals. Had the Court of Appeals reversed the trial court on the issues of negligence, we believe that it would also have reversed that court's disposition of the Court of Appeals own ruling in *Civil* v. *Waterman* (217 F. 2nd 94). The trial court's attempt to distinguish *Civil* v. *Waterman* is plainly as specious as we believe his reasoning to be on the issues heretofore discussed.

CONCLUSION

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE A. KRISEL
Counsel for Petitioner

KRISEL, BECK & TAYLOR
Of Counsel

FILED
OCT 11 1961
JAMES R BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 411.

MYRTLE TWEEDY, as Administratrix of the Goods, Chattels and Credits which were of HAROLD F. TWEEDY, Deceased,

Petitioner,

against

ESSO STANDARD OIL COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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ESSO STANDARD OIL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner applies for a Writ of Certiorari to review a judgment of the District Court, Southern District of New York in favor of defendant (respondent) after a non-jury trial before Judge John F. X. McGohey. The district court's opinion is set forth in an appendix to this brief and is found at 190 F. Supp. 437. The opinion by the Court of Appeals for the Second Circuit is found at 290 F. 2d 921 where it unanimously affirmed the judgment of the district court on the opinion of Judge McGohey.

STATEMENT.

Petitioner sued for damages under the Jones Act (46 USC 688) on account of the death of Harold F. Tweedy who had been employed as a cook on board the *MV Esso Potomac*. Petitioner and deceased were married but had lived

apart for 8 years prior to his death (2, 3).* During this time deceased did not contribute to petitioner's support but under a court order sent a son $15.00 a week (33).

The Facts.

District Judge McGohey made detailed findings of fact which are amply supported by the evidence. In the court below, petitioner accepted Judge McGohey's findings and in this Court these findings are not challenged. No claim has been made in either court that the district court's findings were clearly erroneous. Because Judge McGohey's opinion is attached as an appendix to this brief, it is thought unnecessary to otherwise detail the facts.

Questions Presented.

1. Will this Court grant Certiorari in this ordinary action for negligence because petitioner disagrees with the conclusions made by the District Court and the Court of Appeals and thinks that other conclusions should have been made.

2. Will certiorari be granted where the case does not involve any principles which are important to the public as distinguished from that of the litigants.

Under the "Questions Presented" (petitioner's brief—p. 3) five questions are suggested, none of which has any real application under the facts found by the district court and affirmed by the court below.

Question 1 merely queries whether there was not some negligence under the rules formulated by three cited cases

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* References, except otherwise indicated, are to respondent's appendix in the Court of Appeals.

none of which has any application to the facts in the case at bar.

Question 2 implies that there was failure to warn the deceased although there was no evidence in the record that he was not properly warned, or from a common sense point of view, needed to be warned.

Question 3 asks whether it was not negligence not to equip the vessel with a garbage grinder when petitioner offered no evidence that the vessel should have been so equipped, and respondent's evidence established that it was not usual to do so and, indeed, unique that *any* ship be equipped with a garbage grinder. Moreover, the presence or absence of a garbage grinder had no proven relevance to the deceased's death.

Questions 4 and 5 relate to alleged negligent seamanship but in the trial court the petitioner offered no evidence as to what was good seamanship. Whereas, respondent proved and the court found (respondent's appendix 5a, 6a):

> "The plaintiff offered no testimony as to what good practice required under the existing conditions. The master is a man of long experience. He has been master of the *Esso Potomac* for 15 years. He testified that the procedures he adopted here were, in his opinion, the best under the existing conditions for the following reasons. The vessel had traveled at least a mile and a half before Tweedy's absence was discovered. The vessel could be maneuvered easily. She could, as indeed she did, backtrack over that distance faster than men could row a lifeboat. The area of water visible to lookouts on the house tops was far greater than would be visible to men in a lifeboat. If Tweedy were sighted the master could get the vessel to him much more quickly than a lifeboat and with more equipment and men to get him out of the water. The master testified in person, and cross examination did not shake his testimony. He

> impressed me favorably as to both professional competence and truthfulness. While he undoubtedly had an understandable interest in defending his own professional conduct and reputation, this was not manifest in his demeanor and did not, I find, cause him to color his testimony. I accept this and find the procedures he adopted were proper under the circumstances. He was neither negligent nor inefficient in his rescue efforts."

As authority for petitioner's baseless contention of negligent seamanship, petitioner has the temerity to refer to *Knight's Modern Seamanship* (10th ed.) which was not mentioned on the trial and which was never called to the court's attention. It was not used for purposes of cross examination of the captain of the vessel and certainly could not be decisive of proper seamanship with respect to the facts in the instant case. Moreover, much of the quoted portions of the textbook were eliminated in the 12th edition.

Reasons for Denying the Writ.

Petitioner apparently regards application for certiorari as a mere appeal from a decision of the court below. No where in the petition is there any statement that any of the matters which might tend to induce this Court to grant certiorari exist in the instant case. Disregarding Rule 19(1) of the Rules of this Court, petitioner argues as though the decisions below were appealable as a matter of right. Petitioner also disregards section (b) of the same subdivision which provides that Writs will not be granted except where there is a conflict in decisions between the courts of appeals; where an important question of federal law has not been but should be, settled; or a federal question has been decided in conflict with applicable decisions of this Court; or where the decision has so far departed

from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

All of the contentions which are presently defined by petitioner in this Court have been passed upon by the court below which has rejected them. Petitioner seeks a conclusion on the evidence different from that of the two courts below by twisting and distorting the facts found by the District Court, but as to which petitioner has at all times agreed were supported by the evidence.

On the trial, petitioner made no effort to prove facts which would support petitioner's contentions now made. Indeed, in this Court, petitioner seeks review on the theory that there was unseaworthiness of the vessel when on the trial the claim of unseaworthiness was withdrawn by petitioner's counsel. (Transcript of Stenographer's Minutes—page 60).

The claim of unseaworthiness relates to an assertion that the vessel should have been equipped with a garbage grinder. Petitioner called as a sole witness, one Mosher who was a salesman for a manufacturer of garbage disposal units. (22) Mosher knew nothing about naval architecture nor the practice of installing units on ships. All he could say and all he did say, was that his company sold a few disposal units to some shipyards, and to a few steamship companies. He could not name a single vessel similar to the *Esso Potomac* which was equipped with a disposal unit.

Moreover, Mosher admitted that the disposal units did not dispose of all garbage. They will not destroy large bones, cans, bottles, crates etc. Consequently, at least this type of refuse has to be disposed of over the side. (22)

Respondent produced Frank L. Pavlik chief naval architect for the Sun Shipbuilding Company who was thor-

oughly familiar with the *Esso Potomac.* Indeed, he had drawn some of her plans. He had 35 years experience in naval architecture and shipbuilding. (24) He was familiar with the practice of installing garbage disposal units on vessels of all kinds. (24) He said that even at the present time super tankers are not equipped with units. Of the 400 T.2 tankers built during World War II, none was equipped with such units. Pavlik stated also that disposal units are only partly efficient in that they cannot dispose of all of the refuse which accumulates from the galley. (27, 28)

Another point raised in the petition is that there was a failure to warn the deceased with respect to the dangers of dipping a bucket into the sea while the vessel was in motion. Here the petitioner, to support the argument, has to and does distort the record. Contrary to petitioner's statements, there was no evidence that deceased had not been warned against dipping the bucket and no evidence that he made a practice of doing it. Nor was there any evidence that deceased was caused to fall overboard by dipping the bucket in the sea. The testimony with respect to this was that witnesses guessed that the deceased was probably about to wash the bucket over the side and went overboard. The only witness who gave any testimony regarding this, which testimony petitioner now distorts, was Dopkowski. Dopkowski testified that he thought deceased had walked forward, after dumping the garbage, to an overboard discharge where he could wash out the bucket. This is a far different thing from saying that the deceased did or intended to dip the bucket into the sea. There was no evidence that any such thing occurred. Aside from this it was probably a physical impossibility for the deceased to have done so. The ship had a freeboard of approximately 15 inches. The rail was 2 feet 6 inches high

and 5 inches wide making a total of at least 50 inches. The deceased was but 5′ 2″ tall with a large abdomen.

The final point raised by petitioner is that the master's actions were not in accord with the necessarily indefinite language in *Knight's Modern Seamanship* (10th Ed. Rev. 1941). Naturally, Knight could not express any opinion with respect to the actions which the master took in the instant case to effect a rescue. Indeed, the language employed by Knight deals with a situation where the alarm was given instantly. Moreover, Knight admits (p. 592) that he is not "• • • attempting to lay down rules for the endless variety of situations which may arise in a matter of this kind". • • •

It is important to note also that much of the language quoted by petitioner from Knight's text has been eliminated from the latest or 12th edition, published in 1953.

Petitioner never offered to the trial court any evidence of what was proper seamanship and never referred to the textbook. If petitioner honestly believed that there was something in the textbook which would have confounded respondent's captain, it would certainly have been presented on the captain's long and vigorous cross examination. In any event, there is nothing in either edition of *Knight's Modern Seamanship* which in any wise even implies that the action taken by the captain in respect of rescue efforts was not prompt, efficient and consonant with good seamanship.

On the whole therefore, there is a complete and consistent lack of candor in the petition. The points raised are baseless and for the most part concern only petitioner's views of the established facts, which views are different from the four judges who heard this case below. Petitioner's attack on the integrity of the courts below is

regrettable. The judges in these courts need no defense from respondent but one remark made in the petition itself deserves, in all fairness, comment.

Petitioner states, page 11, that the trial court did not seek briefs. The real fact is that respondent filed a trial memorandum with the trial judge. If petitioner's counsel failed to do likewise he should not be heard to complain about it now. The implication that the trial judge was less than judicial in the determination of this case, is a libel.

POINT I.

THE ONLY QUESTION RAISED BY THE PETITIONER IS AN EVALUATION OF EVIDENCE IN AN ORDINARY NEGLIGENCE CASE NOT INVOLVING ANY UNDECIDED IMPORTANT FEDERAL QUESTION AND NOT OF ANY PUBLIC INTEREST, AND THEREFORE THE PETITION SHOULD BE DENIED.

This Court has repeatedly held that it will not grant certiorari to review evidence or discuss specific facts, *United States* v. *Johnston*, 268 U. S. 220, 227. See also *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178. As Mr. Chief Justice Taft stated in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387 at 393:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the

> public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

The language of Mr. Justice Frankfurter is appropriate to the case at bar and expresses better than could respondent, the reasons why the Writ of Certiorari should be here denied. Mr. Justice Frankfurter said in *McAllister* v. *U. S.*, 348 U. S. 19 at page 24:

> • • • "The present case is one of those instances when a full appreciation before the writ was granted of what the argument developed should have led to a denial of the writ. If this Court is to entertain a negligence case solely because we stand in review in the same position as the Court of Appeals with relation to the District Court and disagree with the result which the Court of Appeals reached in the application of the right standards, the opportunity that is afforded in this case for a review of the Court of Appeals is an opportunity that should generally be afforded when the Court of Appeals reverses a District Court. (Incidentally, this Court is not reviewing the District Court. It reviews the Court of Appeals' review of the District Court*.)
>
> "Again and again and again has it been authoritatively announced that controversies such as this are not for this Court. Nor does it follow that because the case in fact was brought here and has been argued, the merits should be decided. The

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* See *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503; 'This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way'.

short answer is that to entertain this kind of a case inevitably will encourage petitions for certiorari in other like cases tendering an issue of more general importance which close examination proves wanting. Thus will again begin demands on the Court which it wisely cannot discharge and for which legislative relief had to come, or a feeling of discrimination will be engendered in taking some cases that ought not to be taken and rejecting others." • • •

Conclusion.

It is respectfully submitted that the petition is without merit and should be denied.

Respectfully submitted,

Walter X. Connor,
Attorney for Respondent.

James P. O'Neill,
Counsel.

APPENDIX.

Opinion of McGohey, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MYRTLE TWEEDY, as Administratrix of the Goods, Chattels and Credits which were of HAROLD F. TWEEDY, Deceased, Plaintiff, *v.* THE ESSO STANDARD OIL COMPANY, Defendant.	Civ. 123-256

Appearances:

KRISEL, TAYLOR & BECK, 27 William Street, New York, N. Y., Attorneys for Plaintiff, By: GOLDSTEIN & STERENFELD, JACOB RASSNER, of Counsel.

KIRLIN, CAMPBELL & KEATING, 120 Broadway, New York 5, N. Y., Attorneys for Defendant, WALTER X. CONNOR, GEORGE T. DELANEY, JAMES P. O'NEILL, of Counsel.

McGOHEY, D. J.

The plaintiff sues under the Jones Act to recover damages for the alleged wrongful death and conscious pain and suffering of her husband, Harold F. Tweedy.

The suit was tried to the court without a jury. The findings and conclusions appear in the opinion.

Opinion of McGohey, D. J.

The deceased was 58 years old at his death. He was then employed as cook on the defendant's twin screw diesel tanker *Esso Potomac.* He had been a cook on similar vessels for several years. He was last seen alive just after supper, at 6:30, on the evening of April 16, 1957, while the vessel, fully loaded, was proceeding south in Chesapeake Bay from Baltimore, Maryland to Alexandria, Virginia. His body was recovered five days later. The Medical Examiner reported the immediate cause of death as "Drowned, found drowned." As far as appears, the body showed no evidence of other injury, and indeed no such claim was made.

After the crew finished their meal, Dopkowski, a pumpman, volunteered to help Tweedy by washing the dishes. Other members of the crew sat about the galley talking. Tweedy carried the garbage bucket out the door on the port side of the galley opening onto the after deck, to dump the garbage into the water. The vessel was heading into a 15 mile wind. The waves were about 2 ft. high. The vessel was making about eight knots and riding smoothly. She was not taking water over her decks. The after deck was free of oil and grease. The bucket's capacity was about 12 gallons, and it had a removable cover. It was half full and the cover was on. Tweedy proceeded to the rail on the port side near the stern where, after removing the cover, he emptied the bucket over the side. He then left the rail, carrying the empty uncovered bucket, and walked forward near the port rail. The rail was about 2 ft. 6 in. high and the top was 5 in. wide. The vessel's freeboard while running was from 13 to 16 inches. Tweedy was about 5 ft. 2 in. tall and quite stout. He weighed between 200 and 225 pounds. The top of the rail came to about his waistline which, by all accounts, was quite ample.

Tweedy did not reenter the galley. He was in Dopkowski's view from the time he left the galley until he passed

the doorway going forward along the port rail. The deck on the port side was dry and free of oil and grease. No call from Tweedy was heard, but when, after a few minutes, he failed to return, Dopkowski commented on this to the others in the galley and they immediately instituted a search. This included the water, the port side deck outside of the house, the washroom which is close by and forward of the galley, and the crew's quarters. The search failed to discover Tweedy on the vessel or in the vessel's wake or elsewhere in the water. Dopkowski thereupon notified the master. It was then 6:42. This was twelve minutes after Tweedy had left the galley to empty the bucket, and about ten minutes after Dopkowski had last seen him. The vessel, proceeding at eight knots, was then at least a mile and a half south of her position at the time Tweedy was last seen alive.

The master was then on duty on the bridge. As Tweedy was last seen on the port side, the master ordered a hard left turn in order to swing the propeller away from that side. He also ordered a thorough search of the entire vessel, and stationed lookouts on top of the forward and after houses to search the water. He turned on the vessel's searchlight and floodlights. He put her about and set a course to backtrack over the area the vessel had traveled since 6:30. He put through a radiophone call to the Coast Guard and alerted all vessels in the area. These and a Coast Guard vessel joined in the search. The vessel made a series of "sweeps" up and down the bay, traversing the area traveled since 6:30. Some time between 7:15 and 7:30, Dopkowski and another crewman, Krause, told the master they saw what they believed to be Tweedy's body floating face down with arms outstretched. Dopkowski and Krause differed as to the distance this object was from the vessel. The former said "more than fifty feet." Krause first said "one hundred feet," but later that it "might have been

three hundred feet." Neither the master nor the other men were able to see what Dopkowski and Krause said they saw. Nevertheless the master accepted their word and promptly put one engine into reverse, thus turning the vessel sharply, and proceeded with speed to the indicated area. Tweedy's body was not located during a careful search of that area. I find Dopkowski and Krause were mistaken in their belief. The vessel continued to sweep that and the rest of the whole area until 11:30 P. M., when the Coast Guard authorized discontinuance of the search.

The vessel was equipped with two lifeboats. Neither was lowered during the search. Throughout the search, however, the master and all but one man who was on duty in the engine room maintained a constant lookout from the roofs of the fore and aft houses which are the highest parts of the vessel. All were wearing life jackets. The master had life rings with lines attached ready to be thrown over at once if Tweedy was sighted. And men were detailed, if that occurred, to go with the master into the water with additional appropriate equipment which was ready, to rescue Tweedy. The searchlight and the floodlights were on throughout the five hours of searching.

It is contended that the conceded absence of an automatic garbage disposal unit on the vessel made her unseaworthy and constituted negligent failure to provide a reasonably safe place for Tweedy to work. While it is possible, though only with some difficulty and substantial expense, to install such a unit on the *Esso Potomac,* the uncontradicted evidence is that no tankers of her size are, or ever have been, so equipped. The latter fact, though relevant, is, of course, not necessarily conclusive.[1] In any event, I find that the absence of such a unit here had no

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[1] *Texas & P. R. Co.* v. *Behymer,* 189 U. S. 468, 470; *The T. J. Hooper,* 2 Cir., 60 F. 2d 737; *Poignant* v. *United States,* 2 Cir., 225 F. 2d 595.

causal relation to Tweedy's death. He disposed of the garbage over the side without injury of any kind. If, as was suggested in argument although there was no such testimony, he fell or was pulled into the water while attempting to wash the bucket by dipping it into the bay, it was solely his own gross negligence which produced that result. The inherent danger of such conduct was obvious to any man; and surely to one of his age and experience. He had served as cook on similar vessels for many years prior to his death. He certainly was not required to expose himself to such danger by any rule or order, and it certainly was unnecessary for him to do so in order to wash the bucket. The washroom was close by and available for washing out the bucket. Indeed this was frequently done there.

A further contention, and the one most urgently pressed, is that the rescue attempt was negligently conducted in that neither of the vessel's two lifeboats was manned and lowered at 6:42 when Tweedy was reported missing, or later when Dopkowski and Krause reported seeing his body face down in the water. This contention is rejected.

The vessel, a small tanker of the type commonly used on inland waters, has the following dimensions: length 246 ft., beam 40 ft., depth 14.6 ft., motor horsepower 1240, gross tonnage 1228. She carried two lifeboats propelled by oars. She was rated A-1 by the American Bureau of Shipping.

The plaintiff offered no testimony as to what good practice required under the existing conditions. The master is a man of long experience. He has been master of the *Esso Potomac* for 15 years. He testified that the procedures he adopted here were, in his opinion, the best under the existing conditions for the following reasons. The vessel had traveled at least a mile and a half before Tweedy's absence was discovered. The vessel could be maneuvered easily. She could, as indeed she did, backtrack over that distance faster than men could row a lifeboat.

The area of water visible to lookouts on the house tops was far greater than would be visible to men in a lifeboat. If Tweedy were sighted the master could get the vessel to him much more quickly than a lifeboat and with more equipment and men to get him out of the water. The master testified in person, and cross examination did not shake his testimony. He impressed me favorably as to both professional competence and truthfulness. While he undoubtedly had an understandable interest in defending his own professional conduct and reputation, this was not manifest in his demeanor and did not, I find, cause him to color his testimony. I accept this and find the procedures he adopted were proper under the circumstances. He was neither negligent nor inefficient in his rescue efforts.[2]

Tweedy's death did not result from any negligence of, or breach of duty owed him by, the defendant.

The following findings are made so that if, on appeal, this court's decision on liability is reversed, remand for findings on damages will not be required.

There is no evidence whatever that Tweedy endured any conscious pain and suffering. For all that appears, death may have occurred either at once or so soon after he entered the water as to be deemed simultaneous with the accident.

Tweedy was survived by his widow and two sons, Harold and Robert. At the time of their father's death Harold was 25 years old, married and self-supporting. Robert was then 19 years, 10 months old. He is afflicted with cerebral palsy and deaf. Apart from this his general health is good. He is incurable and unemployable. He has not responded to occupational therapy, and with strangers is unruly. Only his mother can manage him. She is with him constantly.

Mrs. Tweedy owns the house in Flushing, New York, where she lives with Robert. A separate apartment in the house is rented.

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[2] See *Miller* v. *Farrell Lines*, 2 Cir., 247 F. 2d 503; cert. denied 355 U. S. 912.

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The Tweedys were never divorced or legally separated but they lived completely apart for eight years prior to his death. They did not meet, speak or correspond with each other during that period although he knew where she lived and she knew he lived with a nephew in Norfolk, Virginia and worked as a seaman for the defendant. During that period she never received any support from him for herself.

For several years before they separated in 1949, Tweedy was a heavy drinker and had a poor work record. Mrs. Tweedy testified that while they lived together he gave her all but $10 a week of his earnings. This is rejected. It is inconsistent with her testimony as a whole and with the uncontradicted documentary evidence. She testified that in 1947 when he was working on a construction project on the Island of Okinawa, he sent her only $400. There is no evidence he sent any additional sums to his children. Whether or not the $400 was sent pursuant to court order and whether it was for support of the children only does not appear.

Mrs. Tweedy brought proceedings in the Domestic Relations Court in Queens County, New York in 1947 and again in 1948, 1949 and 1950. The first two of these appear to have been disposed of without court order. However, on November 9, 1949, Tweedy was ordered to pay $25 per week for the support of his two sons.[3] There was no provision for payment to Mrs. Tweedy for her support. In August, 1950, after Tweedy defaulted for several months in these $25 payments, Mrs. Tweedy brought another proceeding in Queens County Domestic Relations Court. The records in this proceeding were received in evidence; part as Plaintiff's Ex. 24, and the remainder as Defendant's Ex. A-1. The latter includes the petition signed by the

[3] This amount was reduced to $15 when the older son, Harold, became 21 in August, 1953.

plaintiff, the court's "Chronological Record" and other papers including official correspondence between the court and the City Department of Health. The petition, a printed form, on its face states that both Mrs. Tweedy and Robert are "in need and entitled to support" and prays for "such an Order for Support as shall be deemed fair and reasonable." The court's "Chronological Record" states, in a section entitled "Intake Interview," that Mrs. Tweedy was "referred by D. A. *She is concerned with support for son Robert, 13 years old.*" [emphasis added.] The court made a certificate pursuant to the Uniform Support of Dependents Law[4] and forwarded this with a certified copy of the petition to the Juvenile and Domestic Relations Court at Norfolk, Virginia. The certificate states "The needs of the dependents are the sum of $25 per week." This, however, is the same amount ordered in November, 1949 to be paid for the support of Robert and Harold only. As far as appears, Mrs. Tweedy brought no further proceedings. Payments for the sons' support were forwarded by Tweedy's nephew or his sister who received the money from him.

On a few occasions Tweedy sent small gifts of money to his sons at birthdays or holidays. The amount or the frequency of such gifts was not shown. The testimony as to gifts came in through the depositions of Tweedy's sister and his nephew who reside in Norfolk. Tweedy's older son, Harold, was not called as a witness.

There is not the slightest likelihood that if Tweedy had lived he would have attempted reconciliation with the widow or that, if he had, she would have agreed. And it is clear that Tweedy never would have increased his contributions to his invalid son voluntarily. Mrs. Tweedy never sought to have them increased. Tweedy was a completely self-centered man. According to his sister and his nephew,

[4] McK. Unconsol. §§2110.2120.

both of whom were friendly to him and whose testimony on this I accept, he used all his available funds to satisfy his every desire regardless of cost. He left no estate.

I find Mrs. Tweedy had no reasonable expectation of ever receiving contributions from the deceased if he had lived. It is significant that in the several proceedings she did bring between 1947 and 1950 no award was made for her support. Whether this was because the court found her disentitled to support, does not appear.

In *Civil* v. *Waterman Steamship Corporation*[5] and in *Diaz* v. *Lykes Bros. Steamship Co.*,[6] the Court of Appeals for this circuit sustained awards to widows long separated non-legally from their deceased husbands who had not contributed to their support. In neither does it appear how the award was computed. In *Civil*, it was made by the trial judge in Admiralty.[7] In *Diaz*, it was made by a jury. In each case, however, there was present more than the mere existence of a legal right to compel support of the widow. In *Civil*, the widow had made one attempt, later abandoned, to get support 19 years before her husband's death. Thereafter she did not know his whereabouts. In *Diaz*, some three years before his death the deceased returned to his wife for two or three weeks and promised to support her and to establish a home for her and their children.

The fair inference here is that Mrs. Tweedy did not seek support for herself in any of the proceedings she brought.

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[5] 2 Cir., 217 F. 2d 94.

[6] 2 Cir., 229 F. 2d 269.

[7] This case was decided prior to *Conte* v. *Flota Mercante Del Estado*, 2 Cir., 277 F. 2d 664, which held applicable to personal injury claims in Admiralty, the rule announced in *Alexander* v. *Nash-Kelvinator Corporation*, 2 Cir., 261 F. 2d 187-191, that the trial judge in a non-jury personal injury case must make sufficiently explicit findings to show the basis of his award.

It is inconceivable that the Domestic Relations Court would have refused her support if she had asked for it. I find she did not. I think the rule in *Civil* and *Diaz* not applicable to the facts here.

It was stipulated that Tweedy's average annual gross wage for the five years prior to his death was $4,000. There is no evidence as to what, if any, tax exemptions he claimed for dependents but it may safely be assumed he claimed at least two. Accordingly, his annual withheld tax was about $360. His only contribution to any of his family after 1953 was $780 annually to his invalid son. Tweedy's work expectancy at his death was at most eight years. He would then be eligible to receive Social Security benefits, and there is no reason whatever to suppose he would work when he could secure funds without working.

The annual contributions for the 3½ years since Tweedy's death would amount to $2,730. This would not be subject to discount.

The present value of annual contributions of $780 for the next 4½ years, commuted at 4%, is approximately $3,152.

The defendant is entitled to judgment in its favor.

Dated: New York, N. Y., December 6, 1960.

JOHN F. X. McGOHEY

JOHN F. X. McGOHEY
U. S. D. J.

Judgment entered Dec. 6, 1960.

HERBERT A. CHARLSON,
Clerk.